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No. 91-1958

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONALD L. HELLING, ET AL., PETITIONERS

v.

WILLIAM MCKINNEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in this suit against state prison officials under 42 U.S.C. 1983, respondent has stated a claim of cruel and unusual punishment in violation of the Eighth Amendment based on his exposure to secondary cigarette smoke while in prison, even though he failed to establish that he had serious medical needs resulting from the exposure and that prison officials were deliberately indifferent to any such needs.

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INTERESTS OF THE UNITED STATES

The court of appeals in this case held that an inmate's exposure to secondary tobacco smoke constitutes cruel and unusual punishment within the meaning of the Eighth Amendment if the exposure is at a level found by a court to pose an unreasonable risk of harm to his health. Congress has recognized and addressed the health hazards of smoking through labeling requirements, see *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2615-2617 (1992); the Department of Health and Human Services and other federal agencies have conducted numerous studies of the effects of smoking and exposure to secondary tobacco smoke; and Congress and federal agencies (including the Bureau of Prisons) have adopted restrictions on smoking in certain places under federal control. The United

States also is responsible for enforcing the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, which authorizes the Attorney General to bring an injunctive action against state officials if he has reason to believe that they are "subjecting persons residing in or confined to [a prison or correctional facility] * * * to egregious or flagrant conditions which deprive such persons" of constitutional rights. 42 U.S.C. 1997a(a). At the same time, the Attorney General, through the Bureau of Prisons, is responsible for managing federal correctional institutions and for the "safekeeping, care, and subsistence" of persons maintained in them. 18 U.S.C. 4042. As a consequence, the Department of Justice defends actions brought by federal inmates alleging that conditions of their confinement violate the Eighth Amendment. The United States therefore has several significant interests in the development of sound principles governing application of the Eighth Amendment in this setting.

STATEMENT

This case presents the question whether a prison inmate's exposure to secondary cigarette smoke—sometimes known as environmental tobacco smoke (ETS)—constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment.

1. Respondent William McKinney was convicted of murder in state court and is serving his sentence in the Nevada prison system. At the time this case arose, he was incarcerated in the Nevada State Prison in Carson City, Nevada.[1]

On December 18, 1986, respondent filed a pro se complaint under 42 U.S.C. 1983 against the Director of the Nevada Department of Prisons, the warden and associate

[1] At about the time the court of appeals rendered its first decision, respondent was transferred to the Ely State Prison. Br. in Opp. 5; Reply Br. Pet. Stage 10.

warden of the Nevada State Prison, and a unit counselor at the prison. J.A. 1-3. He alleged, *inter alia*, that he had shared a cell with a series of roommates who were heavy smokers; that he had unsuccessfully requested to be moved to a single room or to a room with a nonsmoker; that smoking is also allowed in classrooms and the law library; and that prison officials had done nothing to separate nonsmoking inmates from those who smoked. J.A. 5-10. Respondent further alleged that he suffered from nosebleeds, headaches, loss of energy to exercise, shortness of breath, and chest pains as a result of exposure to secondary cigarette smoke, and that the exposure constituted cruel and unusual punishment in violation of the Eighth Amendment. J.A. 10-12. Respondent sought an injunction prohibiting petitioners from housing him with inmates who smoke, as well as compensatory and punitive damages. J.A. 14-15.

In their answer, petitioners admitted that respondent had at various times requested not to be housed with inmates who smoked, but denied that "they have done nothing to separate the nonsmoking inmates from the smokers" and stated that they "have made efforts to do so, to the greatest extent possible." J.A. 17. Petitioners also filed an affidavit of petitioner Helling, who described the assignment of inmates for housing within the prison. J.A. 21-24. He explained that an inmate is first classified to a particular housing category, such as general population, protective custody, administrative segregation, or disciplinary segregation. J.A. 22. The inmate is then assigned to a particular unit, wing and cell, based on such factors as "possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as practical." *Ibid.* Helling stated that the relief respondent sought—a prohibition against placing him in any wing of a unit that houses inmates who smoke—"would severely

limit the prison's housing options." J.A. 23. Helling also stated that "[s]moking is very important to many inmates," and expressed the view that "if smoking were banned at [the Nevada State Prison] it would create a potentially dangerous situation due to the anger of those inmates who do smoke." *Ibid.*

2. The parties consented to trial before a magistrate, who consolidated respondent's motion for a preliminary injunction with the trial on the merits. After presentation of respondent's case, the magistrate granted petitioners' motion for a directed verdict and entered judgment in their favor. Pet. App. D1-D10.

The magistrate first rejected respondent's contention that he has a constitutional right to be housed in a smoke-free environment. Pet. App. D3-D7. She noted that while "society may be moving toward an opinion as to the propriety of non-smoking and a smoke-free environment, society cannot yet completely agree on the propriety of non-smoking areas and a smoke-free environment." *Id.* at D3. It follows, the magistrate reasoned, that whether to provide smoke-free areas in a prison "must be left to the discretion of legislatures and prison officials who must operate the prison to the best of their abilities, and those officials must make those decisions after consideration of all factors relevant to the particular institution and the care and welfare of all inmates." *Id.* at D4 (quoting *Gorman* v. *Moody*, 710 F. Supp. 1256, 1262 (N.D. Ind. 1989)).

The magistrate therefore concluded that respondent could prevail on his Eighth Amendment claim only if he showed that petitioners were "deliberately indifferent" to "serious medical needs" that he was currently experiencing due to exposure to secondary cigarette smoke. Pet. App. D5-D6. Based on testimony adduced by respondent, however, the magistrate found that he had "failed to show either a serious medical need or deliberate indifference to it." *Id.* at D7. She pointed out that although

respondent complained of sore throat, watery eyes, and similar "cold symptoms" when exposed to secondary cigarette smoke, he "admitted on cross-examination [that] he ha[d] also complained of those symptoms resulting from exposure to butane gas, living in a lower bunk, the quality of water at the prison, as well as the quality of his diet," and conceded that "he had no idea what actually caused these symptoms and just assumed that it was the cigarette smoke." *Ibid.* Respondent also admitted on cross-examination (and his witnesses'-testimony showed) that he had been examined for these "cold-like" symptoms by the prison's medical department, that the examining physician found nothing wrong for which he could be treated, and that he was told his symptoms could not be definitely traced to exposure to cigarette smoke. On this record, the magistrate concluded that respondent had "completely failed" both "to establish deliberate indifference to serious medical needs" and "to adduce any expert testimony or provide any medical evidence which would prove [that petitioners'] acts were the proximate cause of his injuries" or that "exposure to cigarette smoke could even cause such symptoms." *Id.* at D8-D10.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. C1-C48. It affirmed the directed verdict for petitioners on respondent's claim of deliberate indifference to serious medical needs, observing that respondent "was examined by the prison doctor, who found no serious existing ailments requiring treatment." *Id.* at C39-C40.

The court of appeals further held, however, that the magistrate had erred in framing the broader issue in "all-or-nothing terms"—*i.e.*, that respondent either has a broad constitutional right to a smoke-free environment, or has only a right to medical attention for proven serious medical needs—because that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that

pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment." Pet. App. C5. The court previously had held that exposing a prisoner who is particularly sensitive to ETS because of a preexisting medical condition may constitute cruel and unusual punishment. *Id.* at C10 (citing *Franklin* v. *Oregon*, 662 F.2d 1337, 1346-1347 (9th Cir. 1981) (housing an inmate suffering from throat cancer with a smoker may violate the Eighth Amendment)). In this case, the court of appeals extended that rationale to hold that such exposure violates the Eighth Amendment even where the inmate does not have a special vulnerability, if a court finds that continual involuntary exposure to ETS poses an "unreasonable" risk of harm to his health. Pet. App. C14.

In reaching this conclusion the court of appeals relied on reports issued by the Surgeon General between 1979 and 1986 regarding the environmental and health effects of exposure to secondary smoke, and a draft report on that subject released by the Environmental Protection Agency in 1990. Pet. App. C14-C19. The court also found it significant that unlike the general population, prisoners are not free to avoid or leave places where smoking is allowed; that approximately two-thirds of the inmates in the Nevada State Prison smoke;[2] that respondent had been confined in a six-foot by eight-foot cell with a roommate who smoked; and that smoking also was permitted elsewhere in the prison, except in the infirmary and culinary.[3] *Id.* at C19-C20. For these reasons, the court believed that a showing that exposure to ETS endangers human health would be sufficient to establish an Eighth Amendment violation, even without a separate inquiry into society's evolving standards of decency.

[2] See also J.A. 21 (affidavit of petitioner Helling); J.A. 50 (joint pretrial order).

[3] See also J.A. 50 (joint pretrial order).

Id. at C21-C25. But in addition, the court believed that "the attitude of our society has evolved at least to the point that it violates current standards of decency to expose unwilling prisoners to ETS levels that pose an unreasonable risk of harm to their health." *Id.* at C25-C26.

The court of appeals remanded the case to the district court to allow respondent to present evidence regarding the level and degree of his exposure to ETS and whether that exposure is sufficient to create an unreasonable risk of harm to his health. Pet. App. C30.[4] The court held, however, that petitioners are entitled as a matter of law to qualified immunity from suit for damages in their personal capacities, because at the time they acted, "there was no clearly established liability for exposing prisoners to ETS." *Id.* at C31.[5]

4. Petitioners then sought review in this Court. The Court granted their petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Wilson* v. *Seiter*, 111 S. Ct. 2321 (1991). Pet. App. B1-B2. There, the Court held that a claim that prison conditions violate the Eighth Amendment has both an objective and a subjective component, the latter requiring a prisoner to establish "deliberate indifference" on the part of prison officials.

5. On remand, the court of appeals reinstated its judgment and remanded for further proceedings consistent with both its own prior opinion and *Wilson* v. *Seiter*. Pet.

[4] The court recommended that the district court exercise its authority under Fed. R. Evid. 706 to appoint an environmental toxicologist as an expert witness, who could furnish the court with scientific evidence on the health effects of ETS and the concentration levels of ETS at the Nevada State Prison. Pet. App. C35-C38.

[5] The court of appeals also held that the Nevada statute barring smoking in public places applied to the prison's library. Pet. App. C32-C34. The Nevada Legislature subsequently amended the statute to exempt correctional facilities from coverage. See Reply Br. Pet. Stage 16.

App. A1-A7. The court of appeals explained that *Wilson* v. *Seiter* simply added another element to an Eighth Amendment claim, and did not vitiate its holding that exposure to levels of ETS that pose an "unreasonable risk" of harming an inmate's health satisfies the objective component of the Eighth Amendment standard. *Id.* at A5-A6.

6. On January 10, 1992, before the court of appeals rendered its decision on remand, the Director of the Nevada Department of Prisons adopted a formal smoking policy. App., *infra*, 1a-2a. Under that policy, smoking is prohibited in classrooms, libraries, gymnasiums, chapels, culinaries, industries and infirmaries, except in areas specifically designated for that purpose. In addition, "[c]ontingent upon space availability," wardens may designate non-smoking sections in inmate dormitory settings, and "[r]easonable efforts may be made by the institutional classification committees to accommodate non-smokers in double-bunked housing areas." *Id.* at 2a. Non-smoking inmates who wish to be housed with another non-smoking inmate must submit a request in writing, and "[a]s with any incompatible living situation, accommodations will be made as necessary, consistent with security considerations and space availability." *Ibid.*

SUMMARY OF ARGUMENT

A. Respondent does not challenge the finding by both courts below that he failed to prove that he now has any "serious medical needs" as a result of his exposure to environmental tobacco smoke (ETS), or that prison officials have been "deliberately indifferent" to any such needs. Respondent likewise does not challenge the court of appeals' holding that petitioners are entitled to qualified immunity from suit for damages. All that remains of this case, then, is respondent's request for injunctive relief barring petitioners from housing him in the future with inmates who smoke. The appropriateness of such injunctive relief presumably would be affected by the smoking policy promulgated by the Director of the Nevada Department of Prisons in January 1992, which neither court below has examined. But the novel Eighth Amendment claim endorsed by the court of appeals is without merit quite aside from that policy.

Under this Court's cases, an Eighth Amendment challenge to conditions of confinement has both an objective component and subjective component. The former requires the prisoner to show that the challenged conditions have resulted in "serious deprivations of basic human needs." *Rhodes* v. *Chapman*, 452 U.S. 337, 346-347 (1981). The subjective component requires the prisoner to show "deliberate indifference" to those needs on the part of prison officials.

B. Mere exposure to ETS does not violate the objective component of the Eighth Amendment standard. Smoking is widespread in society, and millions of people are exposed to its secondary effects on a daily basis. Exposure to ETS in prison therefore cannot be regarded as "cruel" or "unusual" or even as "punishment" within the ordinary meaning of those words, much less in the heightened sense in which they are used in the Eighth Amendment.

This is not to minimize the important issues of public health, environmental quality, and personal preference associated with smoking, including its secondary effects on nonsmokers. Congress, the Secretary of Health and Human Services, and other federal officials have recognized those concerns, and have adopted some regulation of smoking in places under federal control. But it does not follow that such regulatory measures are required by the Constitution whenever an inmate might be exposed to ETS, because the Eighth Amendment does not incorporate whatever code of environmental regulations have been adopted by Congress, the Executive Branch, or state and local governments for society at large.

Moreover, the words "cruel" and "unusual"—and this Court's understanding of the Eighth Amendment as being concerned with the "unnecessary and wanton infliction of

pain," *Hudson* v. *McMillian*, 112 S. Ct. 995, 998 (1992) (emphasis added)—indicate that the impact of the punishments proscribed by the Eighth Amendment was expected to be direct and palpable. Accordingly, the Eighth Amendment is directed at actual or immediate harms of a serious nature. It does not, at least as a general rule, apply to potential and distant harms, such as the possibility that an inmate might experience adverse health effects in the future as a result of his exposure to ETS while in prison.

It also is significant that smoking is a habit that is deeply rooted in our history and experience. Despite the adverse consequences of smoking from the perspective of the public health, smoking continues to be lawful. Accordingly, at least for the present, we have, as a society, effectively chosen to accept the considerable health risks associated with smoking, including its secondary effects on nonsmokers. Accordingly, the absence of a smoke-free environment in prison cannot be regarded as the denial of a "minimally civilized measure of life's necessities." *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991). Although governmental bodies have adopted some restrictions on smoking, they do not reflect a universal condemnation of smoking of the sort that would be required to support respondent's claim. Rather, such measures respond at least in part to environmental concerns and matters of personal preference; and they often reflect and seek to accommodate the strongly opposing views of smokers and nonsmokers, including the differing importance the two groups attach to the health consequences of smoking. The court of appeals' recognition of an Eighth Amendment claim based on mere exposure to ETS also fails to respect the corresponding need for prison administrators to weigh the desires of smokers and nonsmokers and to maintain flexibility in inmate assignment.

C. Both the record developed to date and the smoking policy adopted by the Director in January indicate that respondent could not satisfy the subjective component of the Eighth Amendment standard either. However, if the

Court does not reverse the Ninth Circuit's ruling regarding the objective component of respondent's Eighth Amendment claim, it may choose to remand for the lower courts to consider the subjective component in the first instance. The lower courts' application of the "deliberate indifference" standard in this setting would require consideration of the countervailing interests of inmates who smoke and the difficulties faced by prison administrators in accommodating those interests.

ARGUMENT

A PRISON INMATE CANNOT ESTABLISH AN EIGHTH AMENDMENT VIOLATION BASED ON HIS EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE, IN THE ABSENCE OF A SHOWING OF DELIBERATE INDIFFERNCE TO SERIOUS MEDICAL NEEDS HE EXPERIENCES AS A RESULT OF THE EXPOSURE

A. Introduction

1. The magistrate found that respondent had "completely failed" to prove either the existence of any "serious medical needs" as a result of his exposure to environmental tobacco smoke (ETS) in the Nevada State Prison, or "deliberate indifference" to any such needs on the part of prison officials. Pet. App. D6-D10. The court of appeals affirmed those findings, *id.* at C38-C40, and respondent does not challenge them here. Nor does respondent challenge the court of appeals' holding that petitioners are entitled to qualified immunity from suit for damages in their individual capacities. See Br. in Opp. 4 n.1. All that remains, then, is respondent's request for injunctive relief barring petitioners from housing him in the future with inmates who smoke. J.A. 14.

The smoking policy adopted by the Director of the Nevada Department of Prisons last January presumably would undermine respondent's ability to prove a current Eighth Amendment violation on remand and establish the

appropriateness of prospective relief. Neither court below, however, has had an opportunity to consider respondent's Eighth Amendment claim in the concrete text of that new policy.[6] For this reason, respondent's claim before this Court that he has a constitutional right not to be housed in the future with inmates who smoke has a decidedly abstract quality. But his claim was without merit even prior to the Director's recent promulgation of a formal smoking policy. Other courts, in contrast to the Ninth Circuit in this case, have rejected Eighth Amendment claims based on exposure to ETS.[7] This Court should do the same.

2. The Eighth Amendment proscribes the infliction of "cruel and unusual punishments." Although most decisions interpreting the Amendment have involved the constitutionality of sentences imposed by a court, it has also been applied to "deprivations that were not specifically part of the sentence but were suffered during imprisonment." *Wilson* v. *Seiter*, 111 S. Ct. 2321, 2323 (1991). This Court has evaluated the constitutionality of non-sentencing deprivations by assessing whether they involve "unnecessary and wanton infliction of pain." See *Hudson* v. *McMillian*, 112 S. Ct. 995, 998 (1992); *Wilson* v. *Seiter*, 111 S. Ct. at 2323; *Graham* v. *Connor*, 490 U.S. 386, 398 n.11 (1989); *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986); *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981); *Estelle* v. *Gamble*, 429 U.S. 97, 103-104 (1976). This stringent standard is grounded in the recognition

[6] In addition, we have been informed by the Office of the Attorney General of Nevada that respondent is curently housed in a single cell at the Ely State Prison.

[7] See *Clemmons* v. *Bohannon*, 956 F.2d 1523 (10th Cir. 1992) (en banc); *Steading* v. *Thompson*, 941 F.2d 498 (7th Cir. 1991), cert. denied, 112 S. Ct. 1206 (1992); *Caldwell* v. *Quinlan*, 729 F. Supp. 4 (D.D.C.), aff'd, 923 F.2d 200 (D.C. Cir. 1990), cert. denied, 112 S. Ct. 295 (1991); *Gorman* v. *Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); see also *Wilson* v. *Lynaugh*, 878 F.2d 846, 851 (5th Cir.), cert. denied, 493 U.S. 969 (1989); but see *Avery* v. *Powell*, 695 F. Supp. 632 (D.N.H. 1988).

that only deprivations that constitute *punishment* may violate the Eighth Amendment. *Wilson* v. *Seiter*, 111 S. Ct. at 2325.

Accordingly, the Court has held that an Eighth Amendment challenge to conditions of confinement has both an "objective component" ("was the deprivation sufficiently serious?") and a "subjective component" ("did the officials act with a sufficiently culpable state of mind?"). *Wilson* v. *Seiter*, 111 S. Ct. at 2324. To satisfy the former the prisoner must show that the conditions of his confinement resulted in "serious deprivations of basic human needs." *Rhodes* v. *Chapman*, 452 U.S. at 347; accord, *Wilson* v. *Seiter*, 111 S. Ct. at 2329. To satisfy the subjective component, the prisoner must establish "deliberate indifference" on the part of prison officials—a standard drawn from the holding in *Estelle* v. *Gamble* that a prisoner alleging inadequate medical care must, in order to establish an Eighth Amendment violation, show "deliberate indifference" to his "serious" medical needs. 111 S. Ct. at 2323, 2326 (quoting 429 U.S. at 106).

While related, the objective and subjective components are independent, and they therefore need not be analyzed in any particular order. Nor need both be analyzed if the court finds that the prisoner has failed to satisfy one. Cf. *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984). Here, we shall primarily address the objective component—both because that was the subject of the court of appeals' first decision (which it reinstated on remand from this Court), and because, in our view, the case may be disposed of on that basis alone, without the extensive trial contemplated by the court of appeals.

B. Mere Exposure To Environmental Tobacco Smoke Does Not Violate The Objective Component Of The Eighth Amendment Standard

1. The court of appeals plainly erred in holding that exposure to ETS may constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment,

even in the absence of a showing by the inmate that he experiences serious medical problems as a result of the exposure and that prison officials have been deliberately indifferent to those problems. Smoking is widespread, both in prisons[8] and among the more than 45 million smokers in our society at large.[9] As a consequence, millions of nonsmokers are exposed to ETS on a daily basis, in their homes, workplaces, and elsewhere. Especially when the issue is considered in this broader context, exposure to ETS in prison simply cannot be regarded as "cruel" or "unusual" or even as "punishment" in the ordinary meaning of those words, much less in the special sense in which they are used in the Eighth Amendment.

We do not minimize the important issues of public health, environmental quality, and intense personal preference associated with smoking, including its secondary effects on persons exposed to ETS. To the contrary, beginning with the Surgeon General's 1964 Report on the health hazards of smoking,[10] the United States Government has been at the forefront of assessing and responding to those concerns and educating the public about attendant health risks. Congress responded to the Surgeon General's report (and to planned regulatory initiatives by the Federal Trade Commission) by enacting the Federal Cigarette Labeling and Advertising Act in 1965. Pub. L.

[8] The parties to this case agreed that approximately two-thirds of the inmates in the Nevada State Prison smoke. See J.A. 50; Pet. App. C19. Other estimates of the incidence of smoking among inmates have been as high as 90%. See Pet. App. C46 n.20; Hawaii *et al.* Amici Br. 4.

[9] Centers for Disease Control, *Cigarette Smoking Among Adults —United States 1990*, 41 Morbidity & Mortality Weekly Report (May 22, 1992).

[10] U.S. Dep't of Health, Education and Welfare, U.S. Surgeon General's Advisory Committee, *Smoking and Health* (1964). See also U.S. Dep't of Health and Human Services, Report of the Surgeon General, *Reducing the Health Consequences of Smoking: 25 Years of Progress* (1989).

No. 89-92, § 2, 79 Stat. 282, as amended, 15 U.S.C. 1331-1340. The 1965 Act was amended in 1970 and 1984 to strengthen the warning labels. See Pub. L. No. 91-222, § 2, 84 Stat. 87; Pub. L. No. 98-474, 98 Stat. 2201; *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2615-2617 (1992); see also 15 U.S.C. 1341 (providing for research and public education program).

In addition, as the court of appeals pointed out (Pet. App. C15-C19), the Surgeon General issued a series of studies of ETS between 1979 and 1986. His 1986 report concluded that exposure to ETS is a cause of lung cancer and that acute and chronic respiratory diseases have been linked to ETS.[11] In 1990, the Environmental Protection Agency published notice of a draft report on the subject of passive smoking, which estimated that approximately 3800 lung cancer deaths annually among nonsmokers are attributable to exposure to ETS.[12] Congress and federal agencies have responded to the various concerns about ETS by adopting restrictions on smoking in certain public places and other locations subject to federal jurisdiction.[13] The Bureau of Prisons has adopted regulations restricting smoking in federal prisons. 28 C.F.R. 551.160

[11] U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Involuntary Smoking* (1986). See also U.S. Dep't of Health, Education and Welfare, Report of the Surgeon General, *Smoking and Health* (1979); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Cancer* (1982); U.S. Dep't of Health and Human Services, Report of the Surgeon General, *The Health Consequences of Smoking: Chronic Obstructive Lung Disease* (1984).

[12] EPA, *Health Effects of Passive Smoking: Assessment of Lung Cancer and Respiratory Disorders in Children (External Review Draft)*; see 55 Fed. Reg. 25,874 (1990).

[13] See 49 U.S.C. App. 1374(d) (Supp. II 1990) (banning smoking on all domestic flights); 14 C.F.R. 252.7 (further regulating smoking on aircraft); 41 C.F.R. 101-20.105-3 (General Services Administration regulations governing smoking in federal buildings).

et seq.[14] And a number of state and local governments likewise have adopted laws, ordinances and policies restricting smoking in public places—including, in some instances, prisons. Pet. App. C25-C29.

It by no means follows, however, that measures such as these are compelled by the *Constitution* whenever it is an inmate who may be exposed to ETS. The Eighth Amendment is not a tool for fashioning a code of prison administration by incorporating whatever environmental regulations happen to have been put in place for society at large at a particular moment in time. The Court should not trivialize the Eighth Amendment's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," *Estelle* v. *Gamble*, 429 U.S. at 102, by construing it to incorporate or impose such environmental-type standards, binding upon the federal and state governments alike, in the particular context of prison administration.

The Court in fact has recognized that it "must proceed cautiously" in applying the Eighth Amendment to conditions of confinement. *Rhodes* v. *Chapman*, 452 U.S. at 351. And it has stressed that "[i]n assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'" *Ibid.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979)).

[14] The Bureau of Prisons' regulations prohibit smoking in libraries, corridors, dining halls, gymnasiums, classrooms and similar places (except in specially designated smoking areas). 28 C.F.R. 551.160(b), 551.162(a). The regulations further provide that "[t]o the extent practicable," the Chief Executive Officer of a prison "shall accommodate nonsmoking inmates in nonsmoking living quarters," and that "[t]he sharing of a cell or living area between a smoker and a nonsmoker will be avoided except where impractical due to circumstances, and then may be done only for limited duration." 28 C.F.R. 551.162(b).

2. Against this background, the formulations used by this Court to give content to the prohibition against "cruel and unusual punishments" foreclose respondent's Eighth Amendment claim based on exposure to ETS. The Court emphasized just last Term that a showing of an "extreme deprivation" is "required to make out a conditions-of-confinement claim." *Hudson* v. *McMillian*, 112 S. Ct. at 1000. The prisoner must show that the challenged conditions have resulted in "serious deprivations of basic human needs"—a denial of the "minimal civilized measure of life's necessities"—as measured against "'the evolving standards of decency that mark the progress of a maturing society.'" *Rhodes* v. *Chapman*, 452 U.S. at 346-347 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958)). The prisoner must, in short, show that conditions of his confinement are "inhumane." *Wilson* v. *Seiter*, 111 S. Ct. at 2327.

It follows, as the Tenth Circuit recognized in rejecting the same claim respondent advances here, that the core conditions of confinement addressed by the Eighth Amendment are shelter, sanitation, food, personal safety, medical care, and adequate clothing. See *Clemmons* v. *Bohannon*, 956 F.2d at 1527; see also *Inmates of Occoquan* v. *Barry*, 844 F.2d 828, 836-839 (D.C. Cir. 1988). Respondent's ETS-based claim falls well outside those core areas.[15] It is not premised on the existence of "seri-

[15] The cases relied upon by the court of appeals (Pet. App. C24-C25) in concluding that respondent's claim requires no departure from the previous limits of Eighth Amendment jurisprudence are inapposite. *Hoptowit* v. *Spellman*, 753 F.2d 779 (9th Cir. 1985), which the court of appeals cited for the proposition that prison inmates have a constitutional right to safe conditions of confinement, addressed that issue in the context of safety hazards that posed an immediate risk of injury. See 753 F.2d at 784; see also *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (discussing constitutional right of institutionalized individual to personal safety from repeated assaults). *Spain* v. *Procunier*, 600 F.2d 189 (9th Cir. 1979), which the court below cited for the proposition that denying prisoners

ous medical needs" that respondent is experiencing at the present time, since both courts below found no merit to such a claim here. Rather, the basis for respondent's claim necessarily is that he might develop such medical needs in the *future*, as a consequence of his exposure to secondary tobacco smoke now. The words "cruel" and "unusual," however, indicate that the impact of the punishments to which the Amendment speaks was expected to be direct and palpable; so too does the Court's interpretation of the Amendment to proscribe those conditions of confinement that amount to "unnecessary and wanton infliction of *pain*." See *Hudson* v. *McMillian*, 112 S. Ct. at 998 (emphasis added).

For these reasons, the Amendment focuses on "the *actual effect* of challenged conditions upon the well-being of the prisoners," *Rhodes* v. *Chapman*, 452 U.S. at 367 (Brennan, J., concurring) (emphasis in original), as well as serious harms that may fairly be characterized as "imminent" or "immediate." Cf. *United States* v. *Bailey*, 444 U.S. 394, 409-411 (1980) (defense of duress or necessity to charge of prison escape); *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136, 2138 (1992) (Article III standing). At least as a general rule, it "does not sweep so broadly as to include possible latent harms to health." *Clemmons* v. *Bohannon*, 956 F.2d at 1527.

Put another way, respondent complains of what is, at most, a failure to provide conditions of confinement that would minimize risks to his future health and well-being. The Eighth Amendment has never been interpreted to impose such a duty on prison administrators. Cf. *Hudson* v. *McMillian*, 112 S. Ct. at 1000 ("society does not

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fresh air may violate the Eighth Amendment, involved an outright denial of any outdoor exercise to prisoners confined for more than four years. Even so, the court declined to hold that deprivation of outdoor exercise "is a per se violation of the eighth amendment." *Id.* at 199.

expect that prisoners will have unqualified access to health care"). Any number of conditions would potentially be the subject of Eighth Amendment claims under that expansive view. For example, the common practice of "double celling," which the Court approved in *Rhodes* v. *Chapman*, may increase the risk of physical or mental injury. See 452 U.S. at 343. Similarly, while prison officials may not serve unsanitary or unwholesome food to prison inmates, the Eighth Amendment does not mandate that prison diets conform to the latest medical evidence concerning what foods are best for long-term health. Thus, the fact that scientific evidence may establish an increased risk of heart disease from eating certain types of food as opposed to others does not mean that it is cruel and unusual punishment for prison officials to serve macaroni and cheese instead of broiled fish.

We do not contend that the Eighth Amendment permits even those conditions of confinement that truly pose a significant risk of proximate and substantial harm to an inmate, so long as the injury has not yet occured and the inmate does not yet suffer from its effects. The Eighth Amendment, for example, plainly bars prison officials from housing an inmate with others who have a serious and readily contagious disease, even though it has not yet been transmitted. See *Hutto* v. *Finney*, 437 U.S. 678, 682-683 (1978). And there may well be other situations in which exposure to toxic or similar substances would present a risk of sufficient likelihood or magnitude—and in which there is a sufficiently broad consensus that exposure of *anyone* to the substance should therefore be prevented—that Eighth Amendment protections would be triggered, even though the effects of the exposure might not manifest themselves for some time.

There is no need in this case to attempt to define more precisely the category of conditions presenting a risk of harm that is sufficiently proximate, substantial, and condemned to run afoul of the Eighth Amendment in this

setting. For however it might be defined, the category cannot reasonably include exposure to environmental tobacco smoke. We acknowledge that the effects of exposure to ETS are significant from a public health perspective. But the possibility that any particular individual will suffer as a result of his exposure to ETS while in prison is speculative, and the circumstances of exposure to ETS in prison may vary widely over time and among inmates. See *Steading* v. *Thompson*, 941 F.2d at 500. Accordingly, the "potential, distant harm" associated with the secondary effects of smoking does not correspond to the "serious medical needs" that the Court found to be encompassed by the Eighth Amendment in *Estelle* v. *Gamble*. See *Clemmons* v. *Bohannon*, 956 F.2d at 1527.

3. More than an assessment of the health risks of ETS in isolation is involved here, however. For better or worse, smoking is a habit deeply rooted in our history and experience. "Two hundred years ago, many of our most revered founding fathers were tobacco farmers." *Caldwell* v. *Quinlan*, 729 F. Supp. at 6. "[T]he Surgeon General has only recently warned against the effects of second-hand smoke," *ibid.*, and "debate persists about how severe the effects of secondary smoke may be." *Steading* v. *Thompson*, 941 F.2d at 500.

It also is significant that although the greater health risks of smoking for smokers themselves *are* well documented and widely acknowledged, smoking still is not generally prohibited, either in prisons or in the Nation at large. At least for the present, we have, as a society, effectively chosen to accept the considerable risks that result from individual choices to smoke, including the secondary effects of smoking on nonsmokers exposed to ETS. It therefore would be implausible to conclude that exposure of an inmate to ETS while in prison constitutes a denial of "the minimally civilized measure of life's necessities" that is "sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson* v. *Seiter*,

111 S. Ct. at 2324 (quoting *Rhodes* v. *Chapman*, 452 U.S. at 347). A smoke-free environment is simply not one of the "basic human needs" to which a prisoner is constitutionally entitled. *Ibid.*[16]

To be sure, a number of state legislatures and local governments have chosen to restrict smoking in public places, and Congress and federal agencies have taken similar steps in certain situations. See Pet. App. C25-C29. But such restrictions are not universal, and "[s]econdary tobacco smoke is common in offices, restaurants, and other public places throughout the United States and the rest of the world." *Steading* v. *Thompson*, 941 F.2d at 500. Moreover, given the extent to which smoking is practiced and tolerated, those restrictions should not be seen as embodying a pervasive condemnation of smoking of the sort that could even plausibily support respondent's Eighth Amendment claim. The restrictions respond in large measure to (and seek to balance) the often *competing* and intensely held positions of smokers and nonsmokers from the standpoint of environmental quality and personal preference, as well as profound *differences* in the importance those two segments of society

[16] The court of appeals sought to avoid this conclusion by fashioning what is essentially a new Eighth Amendment standard: whether the particular condition of confinement (here exposure to ETS) presents an "unreasonable" risk of future harm. That vague standard is unanchored in the text, purposes and judicial construction of the Eighth Amendment, and it would invite a host of novel and broad-ranging judicial challenges to the management of state and federal prisons.

Moreover, even if the new test announced by the decision below were correct, the court of appeals nevertheless erred in suggesting (Pet. App. C21-C25) that the judiciary may determine for itself whether exposure to ETS presents an "unreasonable" risk to an inmate's health for Eighth Amendment purposes, based solely on the statistical likelihood that he will develop an illness. The court would be required to consider whether *society* regards the risk as reasonable, both in general and with particular reference to prisons. *Rhodes* v. *Chapman*, 452 U.S. at 346.

attach to the health risks identified with smoking. And in any event, such regulations have to date essentially carved out exceptions to what has remained a general rule of unregulated smoking (and therefore of unregulated exposure to ETS).[17]

Of course, in many instances, a person who is not incarcerated may be able to avoid exposure to secondary tobacco smoke.[18] Inmates might be less able to do so, because they have less freedom of movement and are not necessarily entitled to be housed where (and with whom) they choose. But people who are not incarcerated are freer than those who are to do many beneficial things. That is one of the advantages that flow from not committing a crime. The fact that incarceration may limit an inmate's ability to avoid exposure to environmental tobacco smoke does not convert an otherwise routine incident of confinement (loss of freedom) into "cruel and unusual" punishment. Compare *Hudson* v. *McMillian*, 112 S. Ct. at 1000 (quoting *Rhodes* v. *Chapman*, 452 U.S. at 347) ("routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society'").

4. Finally, the court of appeals' conclusion that mere exposure to ETS may violate the Eighth Amendment fails

[17] For example, as Amici Hawaii, *et al.*, point out (Br. 12-13), the Ocupational Health and Safety Administration has not to date regulated exposure to ETS in the workplace. It has recently issued a public request for information on that subject, as part of a broader request concerning exposure to indoor pollutants generally. 56 Fed. Reg. 47,892 (1991). See *Action on Smoking & Health* v. *Occupational Safety and Health Administration*, No. 91-1037 (D.C. Cir. Jan. 29, 1992) (sustaining OSHA decision not to issue special standard on ETS in light of request for information on indoor pollutants).

[18] That is not uniformly so: children and other family members, for example, may be effectively unable to avoid exposure to ETS resulting from smoking by other members of their households, and employees may not be able to avoid colleagues who smoke.

to respect the realities of prison administration. Whatever the benefits and costs may be of restricting exposure to ETS in society at large, courts should not assume that the same calculus applies in the vastly different world of prison. Thus, prison administrators reasonably may consider not only the benefits to prisoner health that might flow from a reduction in ETS, but also any adverse effects that might result from efforts to reduce the exposure of nonsmokers to it. Restricting the ability of inmates to smoke could increase the likelihood of unrest and antisocial behavior by prisoners for whom the habit is important. See J.A. 23; cf. *Whitley* v. *Albers*, 475 U.S. at 320.

Even aside from the potential for disruption, prison officials may properly take into account the effect of smoking restrictions on the morale of inmates who want to smoke. See *Steading* v. *Thompson*, 941 F.2d at 500 ("In deciding whether to allow smoking in prison, public officials properly consider both the effects of smoke on nonsmokers and the effects of a ban on those who desire this Faustian pleasure.").[19] In addition, the responsible prison administrator could permissibly conclude that segregation of smokers and nonsmokers might inappropriately elevate that factor over others that prison administrators would regard as equally or more important in classifying and assigning inmates, unduly limit the flexibility needed to run the prison, cause security problems, be unduly expensive, unwisely restrict opportunities for positive interaction among otherwise compatible inmates, and provide opportunities for manipulation by prisoners seeking to move from one cell or unit to another.

For reasons such as these, the Court has often recognized the need to defer to the judgments of officials re-

[19] We have been informed by the Bureau of Prisons that as recently as 1984, it distributed free cigarettes to at least some inmates, both as a technique of institutional management and control and to prevent the development of extortionate practices in connection with the sale of cigarettes among inmates.

sponsible for operating prisons with respect to the details of prison management:

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Procunier v. *Martinez*, 416 U.S. 396, 404-405 (1974) (quoted in *Rhodes* v. *Chapman*, 452 U.S. at 351 n.16).

After considering the relevant factors, the U.S. Bureau of Prisons concluded that it was appropriate to adopt regulations that sharply limit smoking in common areas of federal prisons (except in specially designated smoking locations), and to provide separate housing for smokers and nonsmokers where practical. See 28 C.F.R. 551.160-551.163; see note 14, *supra*. But contrary to the court of appeals' belief (see Pet. App. C28), those regulations do not support its perception of a broad consensus that the standards they embody are *required* by minimum standards of decency to guard against risks to the health of inmates who do not smoke. The regulations' statement of purpose shows that they were designed "[t]o advance towards becoming a clean air environment" as well as "to protect the health and safety of staff and inmates." 28 C.F.R. 551.160(a). Administrators of other prisons might reach a different conclusion and strike a different balance, by pursuing either more stringent or more flexible policies, or by declining to impose prison rules on this area of private inmate conduct.

C. The Subjective Component Of The Eighth Amendment Standard Requires Respondent To Establish Deliberate Indifference To The Adverse Effects Of His Exposure To Environmental Tobacco Smoke

If the Court concludes, contrary to our submission in Point B, that respondent has sufficiently stated a claim insofar as the objective component of the Eighth Amendment standard is concerned, a further inquiry remains. For conditions of confinement can constitute cruel and unusual *punishment* only if the responsible officials "act with a sufficiently culpable state of mind." *Wilson* v. *Seiter*, 111 S. Ct. at 2324. Under *Wilson* v. *Seiter*, the requisite state of mind in this case must be at least one of "deliberate indifference" to the allegedly serious harm, just as it is in cases involving an alleged failure to furnish medical care or other conditions of confinement. *Id.* at 2326-2327. Accord, *Clemmons* v. *Bohannon*, 956 F.2d at 1525-1526, 1528-1529; *Steading* v. *Thompson*, 941 F.2d at 499-500.

Although the magistrate found that respondent had failed to prove deliberate indifference on the part of petitioners to any "serious medical needs" that respondent allegedly was *then* experiencing as a result of his exposure to ETS, she did not separately consider the subjective component in the context of the broader Eighth Amendment principle the court of appeals recognized concerning exposures to levels of ETS that create "unreasonable" risks of *future* harm. See Pet. App. D5-D10. For this reason—and because *Wilson* v. *Seiter* has already resolved the basic question of the state of mind ("deliberate indifference") that must be shown—if the Court does not reverse the judgment of the court of appeals outright, it may wish to remand for the lower courts to consider in the first instance the subjective component of the broader Eighth Amendment claim.

In the proceedings on remand, the Director's recent promulgation of a formal smoking policy, with its re-

strictions on smoking in common areas and provisions for a nonsmoker to request housing with another nonsmoker, might effectively foreclose a finding of deliberate indifference to any concerns respondent still has about the long-term health risks associated with exposure to ETS in prison. Even prior to adoption of that policy, however, the record indicates that officials at the Nevada State Prison (where respondent was previously incarcerated) did attempt to accommodate respondent's requests to avoid being placed with a roommate who smoked, but respondent apparently rejected several alternatives. See Pet. Br. 20-21; DXs F, I-25, I-26, I-32; PXs 2, 6. And it is not clear to what extent respondent based those requests on the possible risks of future harm that the court of appeals found relevant, as distinguished from complaints about the "cold-like" symptoms that he then was allegedly suffering as a result of his exposure to ETS.

Moreover, putting to one side the particular difficulties with respondent's claim on the record of this case, an assessment of the subjective component here would have to take account of the unique setting of a claim based on exposure to ETS. When an Eighth Amendment claim is based on the failure to furnish medical care in response to "serious medical needs" that the inmate is currently experiencing, the State's responsibility to furnish such care "does not ordinarily clash with other equally important governmental responsibilities." *Wilson* v. *Seiter*, 111 S. Ct. at 2326 (quoting *Whitley* v. *Albers*, 475 U.S. at 320). But here, there are countervailing considerations that may properly be balanced against a particular inmate's desire to avoid exposure to ETS. See *ibid.* As Judge Easterbrook has explained:

> No one supposes that restaurateurs who allow smoking are subjecting their patrons to "punishment", or desire to harm them. The guards and administrators who breathe smoky air in the prison are not punishing themselves. No one would suppose, either, that the gentlemen tobacco farmers who wrote

> and adopted the eighth amendment could have conceived of smoke as punishment.
>
> * * * * *
>
> * * * Wardens who resolve the conflict in favor of the inmates who want to smoke could not plausibly be accused of reaching this decision because they hope the smoke will injure other prisoners. * * * Public officials who act *in spite* of an unwelcome consequence of a decision do not "intend" that consequence for constitutional purposes. See *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 * * * (1979).

Steading v. *Thompson*, 941 F.2d at 500.

Thus, even if an inmate explicitly brought the medical risks identified by the court of appeals to the attention of prison officials, a decision by prison officials declining to transfer the inmate to a cell where he would not have a smoker as a roommate (because of sound interests of prison administration that weigh against that course), the officials could not fairly be accused of "deliberate indifference" to the concerns the inmate raised. These difficulties in applying the subjective component of the Eighth Amendment standard to the novel claim endorsed by the court of appeals strongly reinforce our submission in Point B that respondent cannot satisfy the objective component based on mere exposure to the environmental tobacco smoke that results from smoking by other inmates.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1992

APPENDIX

STATE OF NEVADA
DEPARTMENT OF PRISONS
OFFICE OF THE DIRECTOR

MEMORANDUM

DATE: January 10, 1992

TO: ALL WARDENS AND MANAGERS
FROM: RON ANGELONE, DIRECTOR
SUBJECT: SMOKING POLICY

ADMINISTRATIVE DIRECTIVE #53-92
(supersedes A.D. 24-91)

Smoking in program, food preparation/serving, recreational and medial areas is restricted to those areas specifically designated for that purpose. These areas include, but are not limited to, classrooms, libraries, gymnasiums, chapels, culinary's, industries and infirmaries.

Smoking by inmates and/or staff is strictly prohibited during meetings (i.e., staff meetings, training, inmate treatment groups) and during individual inmate counseling/treatment sessions, medical and/or mental health encounters. Employees/inmates are not allowed to smoke in offices shared by others unless every individual in the office agrees to allow smoking.

It is the responsibility of the respective Wardens to designate smoking areas for staff and inmates, consistent with the requirements outlined above. The Assistant Director/Support Services, with the approval of the Director, shall designate smoking areas in Central Office-North. The

Assistant Director/Prison Industries, with the approval of the Director, shall designate smoking areas in Central Office-South.

Contingent upon space availability, Wardens may further designate non-smoking sections in inmate dormitory settings. Reasonable efforts may be made by the institutional classification committees to accommodate non-smokers in double bunked housing areas. Non-smoking inmates who wish to be housed with another non-smoking inmate are to provide a written request to the Associate Warden Programs/Facility Manager. As with any incompatible inmate living situation, accommodations will be made as necessary, consistent with security considerations and space availability.

/s/ Ron Angelone
RON ANGELONE, Director
NEVADA DEPARTMENT OF PRISON

INMATE ACCESS

YES: xx
NO:

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